

November 18, 2004

L. Ward Wagstaff, Esq.
Assistant Attorney General
Natural Resources Division
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

RE: Request that the State Engineer Refrain from Distribution of Water in Cedar Creek Drainage Under Proposed Determination

Dear Ward:

In response to Craig Smith's letter to you dated November 4, 2004, and on behalf of ANR Co., Inc. ("ANR"), we respectfully request that the State Engineer refrain from distribution of water in the Cedar Creek drainage in the manner proposed by Mr. Smith. Such distribution is inappropriate pending a decision on ANR's Motion to Confirm and Accept Original and Amended Protests to the Proposed Determination of Water Rights in the San Rafael Drainage Area, Huntington Creek Division, in Case No. 400701435 before Judge Lyle Anderson. As you know, at the suggestion of the State Engineer, the court's ruling on ANR's motion was delayed pending the Utah Supreme Court's decision in *Green River Canal Co. v. Olds*, Case No. 20030156-SC. The *Green River Canal* case was argued by you and Mr. Smith before the Utah Supreme Court on October 5, 2004. We understand that a decision from the Utah Supreme Court is anticipated early next year.

In addition, ANR takes issue with the request of Huntington-Cleveland Irrigation Company ("HC") that the State Engineer take certain actions outlined in Mr. Smith's letter. First, it is beyond the authority of the State Engineer to prohibit any diversion of ANR water from the Mohrland Portal until a measuring device is placed in the diversion works. Should Judge Anderson deny ANR's pending motion, ANR will voluntarily cooperate in sharing in the costs of installing a measuring device. However, the State's prohibition of the diversion of water until this is accomplished is not required by the proposed determination and is *ultra vires*.

Second, ANR requests the State Engineer to continue to divert water onto the Cedar Creek Ranch. ANR has proposed to reinstate a water sharing agreement with HC employed by the parties in the original quiet title action. A copy of the agreement is enclosed. ANR would agree to the State engineer's distribution of water consistent with this water sharing arrangement to allow both parties to equitably share the Cedar Creek water while litigation is pending.

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Third, HC's allegations that Water Right Nos. 91-316 and 92-251 cannot be satisfied until HC receives 10 cfs of water under Water Right No. 93-1134 are incorrect. As you confirmed in your letter dated July 2, 2004, Water Right Nos. 91-251 and 91-316 were adjudicated in the Price River General Adjudication and published in Book 4 of the Price River Proposed Determination of Water Rights. This is a separate drainage from the San Rafael River Drainage, and HC's rights in the San Rafael Drainage are junior and in fact unrelated to ANR's rights in the Price River Drainage.

ANR's predecessor established its rights in this drainage beginning in 1972 when U.S. Fuel ("USF") directed the Black Hawk Mine water to the Mohrland Mine Portal through USF's interconnecting underground tunnels and mine workings and began conveying a portion of the water through a pipeline to the Town of Hiawatha. In 1972, USF filed change applications with the State Engineer for the pipeline and the changed water use. Although HC protested USF's change applications, HC failed to appear for hearings before the State Engineer regarding the protests. HC not only failed to exhaust its administrative remedies but also failed to appeal the State Engineer's approval of those change applications and the certificates of beneficial use issued to USF. HC is now barred from challenging USF's rights in the Price River Drainage. *See Tanner v. Provo Reservoir Co.*, 98 P.2d 695, 702 (Utah 1940); *S&G, Inc. v. Morgan*, 797 P2d 1085, 1087 (Utah 1990) (holding that a water user that failed to participate in proceedings before the State Engineer waived its rights to judicial review).

Fourth, as you may recall, any statements made by ANR or others during our settlement discussions were for settlement purposes only and were not to be used in a proceeding against the rights of the other. Mr. Smith himself stated this principle at the outset of our settlement discussions and is now inappropriately attempting to use alleged statements from that meeting to ANR's detriment. These settlement discussions are inadmissible in the context of the current proceedings before the State Engineer. In addition, please be aware that ANR has filed non-use applications for Water Rights Nos. 91-316 and 91-251, which contradict Mr. Smith's allegations regarding beneficial use at the Town of Hiawatha. These applications are still pending. Moreover, given the prudential standing requirements established in *Washington County Water Conservancy District v. Morgan*, 2003 UT 58, HC has no standing to challenge ANR's use of Price River water in Hiawatha.

Please give me a call when you have had an opportunity to review this matter.

Very truly yours,

Denise A. Dragoo

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cc: Carl Kingston, Esq. (via e-mail, without enclosure)
J. Craig Smith, Esq. (via e-mail, without enclosure)
Mark Dykes, Esq. (via e-mail, without enclosure)
Ronald Rencher, Esq. (via e-mail, without enclosure)